IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 29 OF 2002.

The Commissioner of Income Tax,
having office at
Aayakar Bhavan Pattol,
Panaji, Goa. .... Appellant.

VERSUS

M/s. Zuari Agro Chemicals Ltd.
Jai Kishan Bhavan,
Zuarinagar, Goa. .... Respondent.

Shri S. R. Rivonkar, Advocate for the Appellant.

Shri P.J. Pardiwalla with Shri S.D. Bhobe, Advocates for the Respondent.

CORAM: R.M. LODHA &
N.A. BRITTO, JJ.

DATE: 22nd AUGUST, 2005.

ORAL JUDGMENT: (PER R. M. LODHA, J.)

Heard Shri S.R. Rivonkar, learned counsel for the Revenue and Shri P. J. Pardiwalla, the learned counsel for the Assessee.

2. This Tax Appeal was admitted on 24th June, 2002 on the following substantial question of law :-

> " Whether on the facts and in the circumstances of the case, by filing a statement under

> section 209A, the assessee has underestimated the advance tax payable by him thereby reducing the amount payable in either of the first two instalments and hence liable to pay interest under Section 216 of IT Act ? ”

3. The aforesaid substantial question of law arises in the facts and circumstances that may be briefly noticed first.

On 13.6.1986 the Assessee filed a statement of advance tax payable under Section 209A(1) of the Income Tax Act in Form No.28A for the assessment year 1987-88. The said statement was filed by the assessee on the basis of the total income returned by the assessee in the return of the income for the assessment year 1985-86 as it was higher than assessed income. On 15.6.1986 the assessee paid first instalment of advance tax amounting to Rs.1,33,66,600/-. The second instalment of advance tax in the sum of Rs.1,33,66,600/- was also paid on 15.9.1986 by the assessee. On 13.2.1986 the assessee filed a revised estimate of advance tax and paid the enhanced amount of advance tax before 15.12.1986. The first and second instalments of advance tax were computed on the basis of income of Rs.8,08,88,420/-. By the revised estimate the advance tax was paid by the assessee on the estimated income of Rs.10,27,56,000/-. The Assessing Officer by his Order dated 25th March, 1991 held that the assessee under-estimated the advance tax and accordingly imposed interest under Section 216 of the Income Tax Act. The amount of interest was computed at

Rs.4,18,772/-. Aggrieved by the order of the Assessing Officer, the Revenue preferred appeal before the Commissioner of Income Tax (Appeals) Central 1, Mumbai. The appellate authority set aside the order of the Assessing Officer and deleted the interest by his Order dated 9.8.1991. Upset by the order of the appellate authority, the Revenue preferred further appeal before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, by its Order dated 31st July, 2001 maintained the order of the first appellate authority. Hence this appeal under Section 260A by the Revenue.

4. Section 209A of the Income Tax Act, 1961 as was existing at the relevant time reads thus:-

> " 209A. Computation and payment of advance tax by assessee. - (1) Every person shall, in each financial year, on or before the date on which the first instalment, or where he has not previously been assessed by way of regular assessment under this Act, on or before the date on which the last instalment of advance tax is due in his case under sub-section (1) of section 211, if his current income is likely to exceed the amount specified in sub-section (2) of section 208, send to the Income-tax Officer -
>
> (a) where he has been previously assessed by way of regular assessment under this Act, a statement of advance tax payable by him computed in the manner laid down in clause(a) or, as the case may be, sub-clause (i) of

clause (d) of sub-section (1) of section 209, or

(b) where he has not previously been assessed by way of regular assessment under this Act, an estimate of -

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209,

and shall pay such amount of advance tax, -

(I) in a case falling under clause (a), as accords with the statement in equal instalments on the dates applicable in his case under section 211; and

(II) in a case falling under clause (b), as accords with the estimate in equal instalments on such of the dates applicable in his case as have not expired, or in one sum if only the last of such dates has not expired.

(2) Where an assessee who is required to send a statement under clause (a) of sub-section (1) estimates on or before the date on which the first instalment of advance tax is due in his case under sub-section (1) of section 211 that, by reason of his current income being likely to be less than the income on which advance tax is payable by him under sub-section (1) or for any other reason, the amount of advance tax computed in the manner laid down in section 209 on the

current income would be less than the amount of advance tax payable by him under sub-section (1), he may send to the Income-tax Officer, in lieu of such statement, an estimate of -

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209,

and shall pay such amount of advance tax as accords with his estimate in equal instalments on the dates applicable in his case under section 211.

(3) Where an assessee who has sent a statement under clause (a) of sub-section (1) estimates on or before the date on which the last instalment of advance tax is due in his case that, by reason of his current income being likely to be less than the income on which advance tax is payable by him under sub-section (1) or for any other reason, the amount of advance tax computed in the manner laid down in section 209 on the current income would be less than the amount of advance tax payable by him under sub-section (1), he may, at his option, send to the Income-tax Officer an estimate of -

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid

down in section 209,

and shall pay such amount of advance tax as accords with his estimate in equal instalments on such of the dates applicable in his case under section 211 as have not expired, or in one sum if only the last of such dates has not expired.

(4) In the case of any assessee who is liable to pay advance tax under sub-section (1) or sub-section (2) or, as the case may be, sub-section (3), if, by reason of the current income being likely to be greater than the income on which the advance tax so payable by him has been computed or for any other reason, the amount of advance tax computed in the manner laid down in section 209 on the current income (which shall be estimated by the assessee) exceeds the amount of advance tax so payable by him by more than 33-1/3 per cent of the latter amount, he shall, on or before the date on which the last instalment of advance tax is payable by him, send to the Income-tax Officer an estimate of -

(i) the current income, and

(ii) the advance tax payable by him on the current income calculated in the manner laid down in section 209.

and shall pay such amount of advance tax as accords with his estimate on such of the dates applicable in his case under

section 211 as have not expired by instalments which may be revised according to sub-section (5):

Provided that in a case where the Commissioner is satisfied that, having regard to the nature of the business carried on by the assessee and the date of expiry of the previous year in respect of such business, it will be difficult for the assessee to furnish the estimate required to be furnished by him in accordance with the provisions of this sub-section on or before the date on which the last instalment of advance tax is due in his case, he may, if the assessee pays the advance tax which he is liable to pay under sub-section (1) or sub-section (2) or, as the case may be, sub-section (3) on or before such date, extend the date for furnishing such estimate up to a period of thirty days immediately following the last date of the previous year in respect of that business and, where the date is so extended, the assessee shall pay, on or before the date as so extended, the amount by which the advance tax already paid by him falls short of the advance tax payable in accordance with his estimate :

Provided further that in the case of an assessee, being a company, the provisions of this sub-section shall have effect as if for the figures and words “33-1/3 percent”, the figures

and words “20 per cent.” had been substituted.

(5)The assessee may send a revised estimate of the advance tax payable by him on or before any one of the dates specified in section 211 and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments.

(6) Every statement or estimate under this section shall be send in the prescribed form and verified in the prescribed manner.

Explanation.- For the purposes of this section and section 212, “current income”, in relation to the advance tax payable by an assessee during any financial year, means the total income of the assessee (exclusive of capital gains and income referred to in sub-clause (ix) of clause (24) of section 2, if any) of the period which would be the previous year for the assessment year immediately following that financial year. ”

5. It is not in dispute that the assessee was previously assessed by way of regular assessment under the Income Tax Act. It is also not in dispute that under Section 209A(1)(a) the assessee forwarded a

statement of advance tax payable by him based on its previous year's total income returned in the return of income as it was higher than assessed income. It is also not in dispute that the assessee before the last instalment of the advance tax was payable estimated high income and as the advance tax payable by him exceeded 33.33%, sent the estimate of the current income and paid the advance tax payable by him on the current income calculated in the manner laid down in Section 209. In the background of these facts, the question arises whether the assessee was liable to pay interest under Section 216 of the Income Tax Act.

6. Section 216 of the Income Tax Act reads thus :-

> " 216. Interest payable by assessee in case of under-estimate, etc. - Where, on making the regular assessment, the Assessing Officer finds that any assessee has -
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> (a) [under section 209A or section 212] under-estimated the advance tax payable by him and thereby reduced the amount payable in either of the first two instalments; or
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> (b) under section 213 wrongly deferred the payment of advance tax on a part of his income,
>
> he may direct that the assessee shall pay simple interest at fifteen per cent per

annum - ”

7. The question that has been posed before us was under direct consideration before the Calcutta High Court in the case of ***Commissioner of Income-Tax v. Indian Tube Co. Ltd. r***eported in 1992 (Vol. 197) I.T.R. Page 522.

The Calcutta High Court held thus :-

> “ The statement which is made under section 209(1)(a) of the Act is different from the estimate which is required to be submitted under section 209A(4) or under the various other provisions of the Act. The Legislature has made a distinction between a statement which is required to be filed under section 209A(1)(a) and the estimate which is to be filed either under section 209A(4) or under the various other provisions of the Act. The interest under section 216 of the Act is attracted only in a case where an estimate is filed in respect of the first two instalments and such estimate is subsequently found to be an underestimate in comparison with the subsequent estimate which is filed before the last instalment. This will be evident from a reading of the various provisions of the Act. To illustrate, section 209A(2) of the Act lays down that, where an assessee who is required to send a statement

under section 209(1)(a) on or before the date on which the first instalment of advance tax is due he may send to the Income-tax Officer, in lieu of such statement, an estimate of his current income calculated in the manner laid down in section 209 of the Act. It will be apparent that, where a statement is filed under section 209A(1)(a) of the Act, the assessee is not required to estimate his current income. He has to comply only with the statutory requirement of section 209(1)(a) and (d)(i) and prepare a statement accordingly. Therefore, when the statute does not require him to make an estimate, the question of underestimating his income does not arise when the statement is made under section 209A(1)(a) of the Act in accordance with the provisions of the section. That the legislature has made a distinction between a statement of advance tax required to be furnished under section 209A(1)(a) and an estimate of advance tax will also be apparent from the fact that the statement under section 209A of the Act is to be furnished in Form NO.28A and the estimate advance tax is required to be submitted in Form No.29. Reference may also be made in this connection to section 217 of the Act which refers to a statement which is required to be furnished under section 209A(1)(a) and an estimate which may be filed in lieu of such statement referred to in section 209A(2) of

the Act. Similarly, section 218(1)(a) makes a specific distinction between a statement required to be filed under section 209A(1) and an estimate filed under section 209A of the Act. Such distinction also is to be found in section 273 of the Act. Section 273(1) gives power to the Income-tax Officer to levy penalty when no statement under section 209A(1)(a) of the Act is filed or such statement is untrue. Section 273(2) of the Act deals with imposition of penalty in a case where the estimate of advance tax is not filed or such estimate is found to be wrong or untrue under section 209A of the Act.

It is, therefore, evident that the Legislature has made a clear distinction between a statement which is required to be filed under section 209A(1)(a) and an estimate which is required to be filed either under section 209A(2) which is to be made in lieu of the statement to be made under section 209A(1)(a) or an estimate which is required to be filed under section 209A(3) or (4) of the Act. Further, when an assessee is required to file a statement under section 209A(1)(a), he is not to estimate his current income. He has to comply with the provisions by furnishing a statement in accordance with section 209(1)(a) or (d)(i) of the Act. To comply with the aforesaid provision, no estimate of the current income is required to be

made by the assessee. He merely calculates his advance tax on the basis of his total income of the latest regular assessment or on on the basis of the total income on the basis of the return subsequently filed where there is a payment under section 140A of the Act, whichever is higher. Hence, the interest which is levied under section 216 of the Act cannot be attracted to a case where the assessee is required to file a statement under section 209A(1) of the Act. But section 216 of the Act is attracted only in a case where the assessee has to estimate his current income and such estimate is found subsequently to be an underestimate compared to the later estimate filed by him in the last instalment. Where an assessee is not required to file an estimate of his income, the question of underestimating the same cannot and does not arise and the provisions of section 216 of the Act cannot be attracted in such a case. The court has to interpret a provision according to the plain meaning of the section and cannot read more into the language of a provision than what is warranted by the express provisions of the section. Where the Legislature uses two different words in the same provision, it is not permissible to equate the scope and meaning of the two words which, on their plain language, are different. It is a well settled rule that, when two interpretations are possible, in

> other words, where the provision is capable of two alternative meanings, the one favouring the taxpayer is to be adopted, particularly when such a provision purports to impose penal interest. ”

8. We find ourselves in agreement with the view taken by the Calcutta High Court. A careful reading of Section 209A(1)(a) of the Income Tax Act would clearly show that the Legislature has used the expression 'statement' therein while in Section 209A(2), 209A(3) and 209A(4) the Legislature has employed the expression ' estimate '. The Legislature thereby made a clear distinction between the statement which is required to be filed under Section 209A(1)(a) and the estimate that is required to be filed under Section 209A(4). When an assessee files a statement u/s 209A(1)(a), he does not nor is he required to estimate his current income. On the basis of the total income returned by the assessee in the return of income or the assessed income whichever is higher, he calculates the advance tax. However when the current income is likely to be greater than the income on which tax payable by him is being computed and the amount of advance tax so payable by him is to exceed 33.33%, such assessee is required to send to the Income Tax Officer an estimate of the current income and the advance tax payable by him on the current income before the last instalment of advance tax is paid under Section 209A(4). Section 216 of the Income Tax Act that provides for interest payable by assessee in case of

under-estimate cannot be invoked where the assessee has acted in conformity with Section 209A(4) and sent the estimate to the assessing officer of the current income and paid the advance tax on the current income calculated in the manner laid out in section 209. Section 216 is attracted only in a case where the assessee is required to estimate his current income and such estimate is found subsequently to be an under-estimate compared to the later estimate for filing the last instalment. Where the assessee is not required, as in a case like this, to furnish an estimate for the first and second instalments, as it was already assessed previously, and rather the assessee is required to file statement under Section 209A(1)(a), the question of under-estimate for the two instalments under Section 216 would not arise.

9. The view of the Tribunal, thus, is in conformity with the legal position. The substantial question of law is answered in the negative and in favour of the assessee.

10. Appeal is dismissed with no order as to costs.

R. M. LODHA, J.

N. A. BRITTO, J.

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